Supreme Court, U.S.
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No. 10-1400

In the
Supreme Court of the United States

QANTAS AIRWAYS LIMITED,
Petitioner,

v.

UPS SUPPLY CHAIN SOLUTIONS, INC., a corporation f/k/a MENLO WORLDWIDE FORWARDING, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 11, 2011

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit, relying upon a Canadian decision previously rejected by U.S. courts, properly disregarded the express goals of a treaty of the U.S., the intentions of the treaty's drafters, and well-established U.S. jurisprudence, when it held that the two-year limitations period for bringing an action set forth under Article 35 of the Montreal Convention did not apply to contribution and indemnity claims brought against an international air carrier?

PARTIES TO THE PROCEEDING BELOW

The following entities were parties before the United States Court of Appeals for the Ninth Circuit:

(1) Petitioner QANTAS AIRWAYS LIMITED; and

(2) Respondent UPS SUPPLY CHAIN SOLUTIONS, INC., formerly known as MENLO WORLDWIDE FORWARDING, INC.

CORPORATE AFFILIATIONS

(1) QANTAS AIRWAYS LIMITED has no parent company and no publicly held company owns 10% or more of its stock.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Qantas Airways Limited respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 10, 2011.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 634 F.3d 1023 (9th Cir. 2011) and 34 Av. Cas. (CCH) 15,794 (Feb. 10, 2011). App. 1a – 11a.

The opinion of the United States District Court for the Central District of California is reported at 32 Av. Cas. (CCH) 15,978 (Jan. 14, 2008). App. 12a – 22a.

STATEMENT OF JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on February 10, 2011, and this petition has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The basis for federal jurisdiction in the district court was 28 U.S.C. § 1331 and 28 U.S.C. § 1332.

TREATY PROVISIONS INVOLVED

This petition involves Article 35 of the Montreal Convention[1] and Article 29 of its predecessor, the Warsaw Convention.[2]

Article 35 of the Montreal Convention provides:

> 1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
>
> 2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 29 of the Warsaw Convention provides:

> 1. The right to damages shall be extinguished if an action is not brought within 2 (two) years, reckoned from the date of arrival at the destination, or from the date on which the

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[1] The Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999, ICAO Doc. No. 9740 (entered into force on November 4, 2003), reprinted in Treaty Doc. 106-45, 1999 WL 33292734 (2000).

[2] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), (entered into force on October 29, 1934), reprinted in note following 49 U.S.C. § 40105 (1997).

aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court seised of the case.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action for indemnity and contribution relating to damage sustained by a consignment of cargo during the course of international transportation by air. The consignment at issue consisted of a turbine aircraft engine that was being transported from Auckland, New Zealand, to Los Angeles, California. The freight forwarder, Menlo Worldwide Forwarding, Inc. ("Menlo"), received the engine for shipment on or about November 14, 2004. Menlo contracted with Qantas Airways Limited ("Qantas") for carriage of the engine. The engine was damaged when it arrived in Los Angeles on or about November 19, 2004.

Chubb Insurance Company of Europe S.A. ("Chubb") filed suit against Menlo and UPS Supply Chain Solutions, Inc. ("UPS"), which had since acquired Menlo, for the loss Chubb incurred as a result of the damage to the engine. UPS settled with Chubb and then, on September 18, 2007, UPS filed a third party complaint against Qantas seeking indemnity and contribution in respect of the amount paid to Chubb.

B. Proceedings Below

Qantas filed a motion to dismiss the third party complaint, on the grounds that it was filed outside the two-year limitations period set forth in Article 35 of the Montreal Convention, a multilateral treaty governing the liability of carriers in the international transportation of passengers and cargo by air. The district court granted the motion to dismiss after a hearing on January 14, 2008. The district court, relying on established precedent, held that the limitations period set forth in Article 35 applied to all actions for damages under the Montreal Convention, including those for indemnity and contribution. While acknowledging that this may result in situations where the original defendant loses its ability to seek indemnity or contribution, the district court pointed out that the drafters intended to "promote uniformity over individual equity." The district court found that the drafters had intended an absolute time limitation with no exceptions and that permitting indemnity and contribution cases to fall outside the limitation would "destroy uniformity and predictability" in cases governed by the Montreal Convention.

UPS appealed the district court's judgment to the Court of Appeals for the Ninth Circuit. On appeal, UPS argued that Warsaw Convention (the predecessor to the Montreal Convention) precedent did not apply in today's air transportation industry. Qantas argued on appeal that Warsaw Convention precedent has determined that the limitations period applies to indemnity actions and should be applied here since Article 35 of the Montreal Convention is virtually identical to Article 29 of the Warsaw Convention. Qantas also argued that UPS' proposed interpretation

of the limitations period would contravene the intent of the Montreal Convention delegates to promote uniformity in all cases involving international carriage by air.

The Ninth Circuit, in a strained interpretation of the term "right to damages," held that an action for indemnity and contribution is not a "right to damages" under Article 35 and thus, the limitations period does not apply. Guided by a case decided in 1978 by the Ontario Supreme Court of Canada, the Ninth Circuit found unpersuasive the consistent line of U.S. district court cases holding that the limitations period of the Warsaw Convention applied to indemnity and contribution claims. In making its decision, the Ninth Circuit disregarded the goals of the Montreal Convention and the intentions of its drafters. Accordingly, the Ninth Circuit reversed the judgment of the district court and remanded the action for further proceedings not inconsistent with its opinion.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the proper application of the limitations period set forth in Article 35 of the Montreal Convention transcends the facts of this case and represents an issue of critical importance to the international air transportation industry, since it involves the fundamental question of when an action is barred under the treaty. Leaving the question open to the local laws of the various countries that are signatories to the Montreal Convention, as well as to the local laws of the various states of the U.S., would undermine the goal of uniformity embodied in the Convention. As discussed more fully below, certiorari should be granted to resolve this important issue.

I

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *CHAN v. KOREAN AIRLINES*

This Court's decision in *Chan v. Korean Airlines* quoted Justice Joseph Story for the fundamental principles of treaty interpretation he set out almost two hundred years ago:

> To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops – whatever may be the imperfections or difficulties which it leaves behind.

Chan v. Korean Airlines, 490 U.S. 122, 135, 109 S. Ct. 1676, 104 L. Ed. 113 (1989)(quoting *The Amiable Isabella*, 6 Wheat 1, 71, 5 L. Ed. 191 (1821)).

The Court pointed out in *Chan* that where the text of a treaty is ambiguous, the drafting history may be consulted to elucidate the text, "but where the text is clear...we have no power to insert an amendment." *Chan v. Korean Airlines*, 490 U.S. at 134.

The Ninth Circuit cited *Chan* for this proposition, but failed to abide by the very treaty interpretation principles it cited. The Ninth Circuit found that the text of the Montreal Convention was clear, which should have precluded any amendment to the text. Nonetheless, the Ninth Circuit inserted an amendment to the text by providing an exception to the limitations period. There is not a single exception to the limitations period to be found anywhere in the text of the treaty. By impermissibly inserting an amendment to a treaty it found to be unambiguous, the Ninth Circuit issued a decision that is in clear conflict with this Court's holding in *Chan*, as well as the line of cases which has consistently held that the limitations period under the Montreal Convention applies to indemnity and contribution actions. The Court should grant certiorari to resolve this conflict.

II

THIS CASE RAISES SUBSTANTIAL, IMPORTANT AND RECURRING ISSUES INVOLVING THE CORRECT INTERPRETATION OF A TREATY OF THE UNITED STATES

The Court has held that the interpretation of a treaty begins with the text. *Chan v. Korean Airlines*, 490 U.S. at 134. Where the text is clear, no amendment will be made. Where the text is ambiguous, the drafting history of the treaty may properly be consulted to elucidate the text. *Id.* Although the Ninth Circuit's decision in this case cites *Chan*, it ignores these longstanding principles of treaty interpretation, and substitutes its own view for the

Montreal framers on an issue of critical importance to the treaty: the application of the limitations period.

The Ninth Circuit acknowledged that the "right to damages" in Article 35 is not defined, but found that the text of Article 35 becomes clear when the treaty is read as a whole. After considering the rest of the treaty, the Ninth Circuit determined that Article 35's "right to damages" did not include a "right of recourse" between carriers and accordingly, Article 35's time bar did not apply to indemnity actions. The Ninth Circuit declined to review the treaty's drafting history, asserting that the treaty language was unambiguous. Yet the Ninth Circuit's interpretation of the supposedly unambiguous text is in direct conflict with the interpretations given that same text by U.S. district courts.

In the more than eighty years of jurisprudence decided by U.S. courts interpreting the Warsaw and Montreal Conventions, virtually all of the courts that have considered the issue have concluded that the two-year limitations period constitutes a condition precedent to bringing an action, including actions for indemnity and contribution. *See e.g., Allianz Global Corporate & Specialty v. EMO Trans California, Inc.*, No. C 09-4893 MHP, 2010 WL 2594360 (N.D. Cal. Jun. 22, 2010); *Motorola, Inc. v. MSAS Cargo Intern, Inc.*, 42 F. Supp. 2d 952, 955 (N.D. Cal. 1998); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 540 (S.D.N.Y. 1988); *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 128 Misc. 2d 12, 488 N.Y.S.2d 547, 549 (1985); *Split End Ltd. v. Dimerco Express, Inc.*, 19 Av. Cas. (CCH) 18,364, 18,368 (S.D.N.Y. 1986).

The Ninth Circuit dismissed these opinions as unpersuasive, choosing instead to be guided by a Canadian case, *Connaught Laboratories Ltd. v. Air Canada*, which held that the limitations period did not bar indemnity actions. However, *Connaught* has been soundly rejected by U.S. district courts. *See e.g.*, *American Home Assurance Co. v. Kuehne & Nagel (AG & Co.) KG*, 544 F. Supp. 2d 261, 263 (S.D.N.Y. 2008); *Royal Ins. Co. v. Emery Air Freight Corp.*, 834 F. Supp. 633, 634-35 (S.D.N.Y. 1993). The very fact that these courts have interpreted the text of the treaty in two completely different ways indicates that the text is ambiguous and that reference to the drafting history is not only appropriate, it is necessary. Had the Ninth Circuit examined the drafting history of the treaty, it would have discovered that the drafters intended the limitations period to serve as an absolute bar to any action.[3]

The drafters of the Montreal Convention considered amending Article 35 to include a provision stating, "Notwithstanding the provisions of paragraph 1 hereof a Court seised of a case may, on good cause shown, condone non-compliance with the time-limit referred to herein." *See* 1 International Civil Aviation Organization, *International Conference on Air Law, Montreal 10-28 May 1999*, at 236 (2001). However, the delegates expressly rejected this proposed language. Moreover, notably absent from the drafting history is any discussion relating to a separate time limitation

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[3] By avoiding a review of the drafting history of the Montreal Convention, and the intentions of the Montreal Convention delegates, the Ninth Circuit avoided facing the higher standard of review of clear error for the district court's findings of historical facts regarding treaties.

for indemnity and contribution cases. If the delegates had intended to create a new rule that would effectively override the application of the treaty to indemnity actions among carriers, they would have engaged in some discussion on the topic. They did not.

The Ninth Circuit impermissibly substituted its own desire for that of the drafters. It acknowledged that the solid line of U.S. district court decisions were in direct conflict with that of the Ontario Supreme Court of Canada on the issue of application of the limitations period to indemnity actions, yet still claimed the text of the treaty was unambiguous. The Ninth Circuit should have concluded that two opposite interpretations of the same text reveal ambiguity and considered the drafting history of the Montreal Convention and the intentions of the drafters.

By ignoring the intent of the drafters in the face of ambiguity, the Ninth Circuit interpreted Article 35 erroneously and undermined the intent and purpose of the treaty. The very title of the treaty conveys the importance of uniformity in rules relating to international air carriage. The preamble of the treaty provides that its goal is to harmonize the existing system of international air carrier liability. Permitting indemnity actions to be susceptible to the statutes of limitation of the various countries which are party to the treaty, as well as those of the states of the United States, would completely destroy harmony and uniformity in the rules of international air carriage.

In summary, the court below incorrectly decided recurring, important questions of treaty law. The proper interpretation of this treaty, which is a matter of importance to the courts, to the parties, and to the

international aviation industry as a whole, should be reviewed and settled by the Court in order to ensure the uniform and proper application of this treaty.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 11, 2011

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55281
D.C. No. CV-06-07267-DSF

CHUBB INSURANCE COMPANY OF EUROPE S.A., a foreign corporation, on behalf of itself and all other underwriters subscribing to policy number CJ7317,
Plaintiff,

v.

MENLO WORLDWIDE FORWARDING, INC., a corporation,
Defendant,

v.

UPS SUPPLY CHAIN SOLUTIONS, INC., a corporation f/k/a MENLO WORLDWIDE FORWARDING, INC.,
Defendant-third-party-plaintiff-Appellant,

v.

QANTAS AIRWAYS LIMITED,)
Third-party-defendant-)
Appellee.)
)

OPINION

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted
September 2, 2010—Pasadena, California

Filed February 10, 2011

Before: Diarmuid F. O'Scannlain, Ronald M. Gould, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Michael S. McDaniel, Countyman & McDaniel, Los Angeles, California, argued the cause for the defendant-third-party-plaintiff-appellant, and filed the briefs. Byron E. Countyman, Geoffrey W. Gill, and Christoph M. Wahner, Countyman & McDaniel, Los Angeles, California, were also on the briefs.

Scott D. Cunningham, Condon & Forsyth LLP, Los Angeles, California, argued the cause for the third-party-defendant-appellee, and filed the brief. Roderick D. Margo and Julia K. Doyle, Condon &

Forsyth LLP, Los Angeles, California, were also on the brief.

Brandon Fried and Richard Fisher, Airforwarders Association, Washington DC, filed a brief on behalf of Amicus Curiae Airforwarders Association, in support of the defendant-third-party-plaintiff-appellant.

Dr. Eduardo T. Cosentino, Langbehn & Cosentino, Buenos Aires, Argentina, filed a brief on his own behalf, in support of the defendant-third-party-plaintiff-appellant.

John D. Dillow, Kathleen M. O'Sullivan, and Mack H. Shultz, Perkins Coie, LLP, Seattle, Washington, filed a brief on behalf of Amicus Curiae Aerospace Industries Association of America, Inc.

Robert A. Rees, Rees Law Firm, PC, Los Angeles, California, filed a brief on behalf of Amicus Curiae Paul Stephen Dempsey, in support of the third-party-defendant-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Montreal Convention's two-year statute of limitations on "the right to damages" in connection with international air cargo shipments applies to suits seeking indemnification and contribution.

I

On November 14, 2004, Air New Zealand Engineering, Ltd. contracted with Menlo Worldwide Forwarding, Inc. ("Menlo") to ship a turbine aircraft engine from New Zealand to the United States. Menlo, in turn, contracted with Qantas Airways, Ltd. ("Qantas") to perform the actual carriage of the engine to its destination. When the engine arrived in Los Angeles on or about November 19, however, it was not in the same condition as when it had left New Zealand; it had been damaged sometime during transportation. The engine's owner subsequently filed a claim with its insurer, Chubb Insurance Co. of Europe, S.A. ("Chubb"), for the resulting loss. Chubb paid the owner $119,666.62.

On November 14, 2006, Chubb brought this suit in federal district court against Menlo's successor-in-interest, UPS Supply Chain Solutions, Inc. ("UPS"), seeking to recover the money that it had paid to the engine's owner. Chubb argued that UPS was liable for the damage to the engine under the Montreal Convention, which governs international air carriage of passengers, baggage, and cargo.[1] The parties eventually reached a settlement under which UPS agreed to pay Chubb $80,000.

On September 18, 2007, UPS filed a third-party complaint against Qantas, seeking indemnification and contribution for sums UPS had paid Chubb. UPS

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[1] *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (2000) ("Montreal Convention").

claimed that it was "in no way responsible" for the damages alleged in Chubb's action; rather, UPS maintained, the engine was damaged as a "direct and proximate result" of "negligent or other actionable conduct" by Qantas.

The district court dismissed UPS's third-party complaint, reasoning that under Article 35 of the Montreal Convention,[2] UPS's claims against Qantas were timely only if brought within two years of the damaged engine's arrival in Los Angeles. Because the claims were not brought within that period, the court held that they were barred and dismissed UPS's third-party complaint with prejudice. UPS timely appealed.

II

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). And, where the text of a treaty is clear, a court has "no power to insert an amendment" based on consideration of other sources. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

[1] The Montreal Convention governs the liability of air carriers in the "international carriage of persons, baggage or cargo." Montreal Convention, *supra*, art. 1. Article 35 of the Montreal Convention states: "The

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[2] Both parties agree that this case is governed by the Montreal Convention.

right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." By its terms, Article 35 extinguishes only a single right: the "right to damages." Thus, unless UPS's claims against Qantas assert such a right, they are not affected by Article 35.

The "right to damages" is not defined in Article 35, but its contours become clear when the Convention is read as a whole. Articles 17 to 19 of the Convention set forth the circumstances in which a carrier is "liable for damage." A carrier is liable, under Article 17(1), for "damage sustained in case of death or bodily injury of a passenger"; under Article 17(2), for "damage sustained in case of destruction or loss of, or of damage to, checked baggage"; under Article 18(1), for "damage sustained in the event of the destruction or loss of, or damage to, cargo"; and under Article 19, for "damage occasioned by delay in the carriage by air of passengers, baggage or cargo."

Other Articles establish limits on a carrier's liability for damage, providing, for example, that compensation for loss of cargo cannot exceed a specified amount per kilogram. *See id.* art. 22(3). Still other Articles impose conditions on the filing of an action for damages against a carrier. Article 31, for instance, requires that in the case of damage to baggage or cargo, "the person entitled to delivery must complain to the carrier" within a specified time period "after the discovery of the damage."

[2] Construed against this backdrop, the "right to damages" referenced in Article 35 is the cause of action under the Montreal Convention by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo. It is plain that Chubb's action against UPS asserted such a right. But it is equally plain that UPS's third-party action against Qantas does not. UPS does not seek compensation for damage sustained to the engine; rather, UPS, as a contracting carrier, seeks *indemnification* (and *contribution*) from Qantas, as an actual carrier, for such compensation it has already paid Chubb.

[3] While the Montreal Convention does not create a cause of action for indemnification or contribution among carriers, it does not preclude such actions as may be available under local law. *See In re Air Crash at Lexington, KY*, No. 5:07-CV-316, 2007 WL 2915187 (E.D. Ky. Oct. 5, 2007) (holding that the Montreal Convention does not preempt a local law cause of action for apportionment among joint tortfeasors); *cf. Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., Ltd.*, 522 F.3d 776, 785-87 (7th Cir. 2008) (holding the same for the Warsaw Convention). The Montreal Convention refers to these local law causes of action for indemnification, contribution, apportionment, or set-off, not as a "right to damages," but as a "right of recourse." This is the right UPS seeks to vindicate in its action against Qantas.

[4] Article 37, entitled "Right of recourse against third parties," provides: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." If Article 35 were

construed to extinguish a carrier's "right of recourse" at the expiration of the specified two-year period, then the Convention would do precisely what Article 37 says it does not: "prejudice the question whether a person liable for damage . . . has a right of recourse against any other person." To avoid an explicit conflict between Articles 35 and 37, the "right to damages" extinguished by Article 35 must be understood *not* to include a carrier's "right of recourse" against another carrier. This reading is consistent with other portions of the Montreal Convention which use "right of recourse" to refer to suits between carriers. *See* Montreal Convention, *supra*, art. 48 (referring to "the rights and obligations of the carriers between themselves, including any right of recourse or indemnification"). In other words, because an action between carriers for indemnification or contribution is premised on the "right of recourse," rather than the "right to damages," Article 35's time bar does not apply. Instead, the timing of such an action is governed by local law.

Article 45 supports this conclusion. It provides that "an action for damages may be brought . . . against [the actual] carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, *the procedure and effects being governed by the law of the court seized of the case.*" *Id.* art. 45 (emphasis added). Thus, where an action is brought against one carrier within Article 35's two-year period, "that carrier shall have the right to require" other carriers "to be joined in the proceedings," and that third-party action will be

subject to "the procedures and effects" of local law, not the strictures of Article 35.[3]

Finally, it is worth noting that Article 35 only mandates that "the right to damages shall be extinguished if *an action* is not brought within a period of two years." *Id.* art. 35 (emphasis added). It does not require that "all actions" relating to a particular event must be brought within two years. Thus, if a party has timely brought an action for damages against an actual carrier or a contracting carrier, nothing in Article 35 prevents the defendant carrier from exercising its Article 45 right to "require the other carrier to be joined in the proceedings," subject to the "procedure and effects" of local law. *See id.* art. 45.

[5] Accordingly, the plain language of the Montreal Convention makes clear that actions for indemnification and contribution are not subject to Article 35's two-year statute of limitations.

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[3] Where, as here, the "court seized of the case" is a federal district court, the Federal Rules of Civil Procedure furnish the applicable law. And where, as here, the contracting carrier seeks to bring in the actual carrier as a third party, the applicable rule is Federal Rule of Civil Procedure 14, which provides:

> A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

Fed. R. Civ. P. 14(a)(1). Qantas does not dispute that UPS's filing of its third-party complaint complied with Rule 14.

B

Qantas argues that, because Article 35 of the Montreal Convention is substantially identical to Article 29 of the Warsaw Convention, which it superseded,[4] we must follow pre-Montreal Convention precedent interpreting Article 29. And, to be sure, some of those cases did hold that Article 29 of the Warsaw Convention applied to third party actions for indemnity and contribution. *See Motorola, Inc. v. MSAS Cargo Int'l, Inc.*, 42 F. Supp. 2d 952, 956 (N.D. Cal. 1998); *Data Gen. Corp. v. Air Express Int'l Co.*, 676 F. Supp. 538, 540-41 (S.D.N.Y. 1988); *Split End Ltd. v. Dimerco Express (Phils)* Inc., No. 85 Civ. 1506, 1986 WL 2199, at *6 (S.D.N.Y. Feb. 11, 1986); *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 488 N.Y.S.2d 547, 549-50 (Sup. Ct. 1985).

We have considered these cases, but find their textual analysis unpersuasive. Instead, we are guided by the Ontario Supreme Court of Canada's ruling that Article 29 of the Warsaw Convention does *not* apply to suits brought by one carrier against another. *See Connaught Laboratories Ltd. v. Air Canada* (1978), 23 O.R. 2d 176 (Can. Ont. Sup. Ct. J.).[5] "Such claims," the court held, were not "intended to be included, within

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[4] *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, art. 29 ("Warsaw Convention").

[5] Warsaw Convention precedent includes the judicial opinions of our sister signatories. *Cf. Air France v. Saks*, 470 U.S. 392, 404 (1985) (deeming "the opinions of our sister signatories to be entitled to considerable weight" on matters of treaty interpretation (internal quotations marks omitted)).

the purview of The Warsaw Convention," which, "deals with the claims of passengers, consignors and consignees, and the liability of carriers therefor," not "with the claims of carriers *inter se*." *Id.* ¶ 26.

Still, Qantas insists that the decisions it cites, despite having been issued by trial courts, are binding on this Court. This is so, Qantas maintains, because the Montreal Convention's drafting history supposedly makes clear that then-existing Warsaw precedent was not to be overruled. We are not allowed to consider the treaty's drafting history, however, because its text is unambiguous. *See Chan*, 490 U.S. at 134 (asserting that, when interpreting unambiguous treaties, courts must "be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the [treaty's] intricate drafting history").[6]

III

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND the case for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[6] After oral argument, we invited amicus briefs addressing, inter alia, how precedent interpreting Article 29 of the Warsaw Convention should affect our interpretation of Article 35 of the Montreal Convention. We would like to thank all the amici who responded to our request.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-7267 DSF (Ex) Date January 14, 2008

Title Chubb Insurance Company of Europe S.A. v. Menlo Worldwide Forwarding, Inc., et al.

Present: The Honorable	DALE S. FISCHER, United States District Judge	
Paul D. Pierson		Not Present
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (IN CHAMBERS) Order GRANTING Third-Party Defendant Qantas Airways Limited's Motion To Dismiss

This matter is before the Court on Third-Party Defendant Qantas Airways Limited's ("Qantas") Motion To Dismiss. Qantas seeks dismissal of UPS Supply Chain Solutions, Inc.'s ("UPS") third-party

Complaint on the grounds that it is time-barred under Article 35 of the Convention for the Unification of Certain Rules for International Air Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 ("Montreal Convention" or "Convention").[1] Having considered the submissions of the parties and having heard the oral argument of counsel, the Court GRANTS Qantas's Motion.

I. FACTS

On or about November 14, 2004, UPS issued an air waybill for the shipment and carriage of an aircraft engine from Auckland, New Zealand to Los Angeles International Airport. (Compl. ¶ 8.)[2] UPS then contracted with Qantas to carry the aircraft engine from Auckland to Los Angeles and deliver it in the same good order and condition in which it was received by Qantas. (Id. ¶ 9.) When Qantas delivered the engine, it was damaged. (Id. ¶ 10.)

Chubb Insurance Company of Europe S.A. ("Chubb") filed a complaint for damage to the engine on November 14, 2006, naming UPS as one of the defendants. UPS settled that action by payment of $80,000. (Id. ¶ 6.)

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[1] The Montreal Convention entered into force on November 4, 2003. See Baah v. Virgin Atlantic Airways, Inc., 473 F. Supp. 2d 591, 592 (S.D.N.Y. 2007).

[2] All references to the "Complaint" are to UPS's third-party Complaint. Its allegations are accepted as true for the purpose of this Motion only. Where reference is made to Chubb Insurance Company of Europe S.A.'s ("Chubb") original complaint, it will be referred to as the "Chubb Complaint."

On September 18, 2007, UPS filed its Complaint, seeking indemnity, partial equitable indemnification, and contribution from Qantas.

II. LEGAL STANDARD

A motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the pleadings. "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The defense that a claim is time-barred may be raised by a motion to dismiss. Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

A matter that is properly the subject of judicial notice may be considered in ruling on a Rule 12(b)(6) motion. Barron v. Reich, 13 F. 3d 1370, 1377 (9th Cir. 1994) (citation omitted). A district court may consider "[r]ecords and reports of administrative bodies," id., and other "matters of public record outside the proceedings," such as motions filed in other cases. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (citations omitted).

III. DISCUSSION

The parties agree that this third-party action is governed by the Montreal Convention, as it concerns international air carriage of cargo. See Montreal Convention art. 1; Kruger v. United Airlines, Inc., 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007) (holding that the Montreal Convention is the exclusive basis for suit where it applies). Montreal Convention Article 35(1) states that "[t]he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."[3]

Although there is no case law considering the application of Article 35 of the Montreal Convention, a nearly identical provision was contained in the predecessor to the Montreal Convention, the Warsaw Convention. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 ("Warsaw Convention"), art. 29. "[C]ourts interpreting the Montreal Convention routinely rely on existing case law under the Warsaw Convention interpreting similar provisions." Kruger v. United Airlines, No. C 06-04907 MHP, 2007 WL 3232443, at *3 (N.D. Cal. Nov. 1, 2007). Cases considering the limitations period under the Warsaw Convention held that there are no exceptions to the two year limitations period, and that it cannot be extended under local tolling rules. See, e.g., Motorola, Inc. v. MSAS Cargo

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[3] The parties have no dispute concerning the applicable period.

Intern., Inc., 42 F. Supp. 2d 952, 955 (N.D. Cal. 1998) ("A majority of courts have . . . refused to allow exceptions to the Convention's two year limitations period.") They also held that the limitations period extended to third-party indemnity and contribution actions. See, e.g., id. at 956; Data Gen. Corp. v. Air Express Int'l Co., 676 F. Supp. 538, 540 (S.D.N.Y. 1988).

UPS admitted in its Answer to the Chubb Complaint that it agreed to transport the engine back from Los Angeles to New Zealand on November 19, 2004. (Chubb Answer ¶ 7.) Thus, the latest the engine could have arrived in Los Angeles is November 19, 2004. (Mot. 10.) Chubb filed its complaint on November 14, 2006, within the two-year limitations period. However, UPS did not file its Complaint until September 18, 2007, ten months after expiration of the limitations period. If this action is subject to the time limitation contained in Article 35, UPS's claims are time-barred.

UPS argues that Article 35 does not apply to its claims for third-party indemnity and contribution. It argues that this action is governed instead by Article 45 of the Convention, which UPS contends subjects claims for indemnity or contribution to the time limitations of the forum in which the case is heard. Article 45 is contained within Chapter V of the Montreal Convention, entitled "Carriage by Air Performed by a Person other than the Contracting Carrier." Chapter V provides certain rules where a "contracting carrier" makes a contract with a consignor for transportation of goods, but another "actual carrier" physically transports the goods. Montreal Convention, art. 39. Article 45 provides:

> In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case.

(emphasis added). UPS contends that the emphasized language requires that the statute of limitations of the forum hearing the case – rather than the limitation contained in the Convention itself – apply in actions for contribution or indemnity between "actual" and "contracting" carriers. This argument is unavailing.

Chapter V does not, as UPS contends, establish a free-standing body of rules for third party contribution or indemnification actions, independent of the requirements of the remainder of the Montreal Convention. Chapter V explicitly incorporates the other Chapters of the Montreal Convention, stating that "[i]f an actual carrier performs the whole or part of carriage which . . . is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention."[4] Montreal

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[4] For this reason, UPS's argument that the treaty drafters would have included an explicit reference to a statute of limitations in contribution or indemnity actions if they intended such a limitation to apply is without merit. Article 40 explicitly subjects both "actual" and "contracting" carriers to the rules in the remainder of the Convention – including the limitations period of

Convention, art. 40. Those rules include the limitations period of Article 35.

UPS's argument that the failure to distinguish between "actual" and "contracting" carriers in the other Chapters establishes that those Chapters do not apply to third party contribution or indemnification actions is without merit. Under Article 45, "actual" and "contracting" carriers are interchangeable – a plaintiff may choose to sue either one. Under Article 40, either type of carrier is subject to the same rules under the remainder of the Convention. There was simply no need to distinguish between the two types of carriers other than in Chapter V, which defines the two types of carriers and clarifies their relationship.[5]

Article 45 does not create an exception to Article 35. Article 45 gives a plaintiff the option of suing the actual or contracting carrier, and gives the carrier sued the "right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case." The plain language of Article 45 refers to the "procedure and effects" of joinder. A statutory limitations period has nothing to do with whether or

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Article 35. The incorporation of the remainder of the Convention also defeats UPS's argument – based on the canon of construction *noscitur a sociis* – that Chapter V provides the exclusive rules for third-party actions, because it is entitled "Carriage by Air Performed by a Person other than the Contracting Carrier."

[5] UPS's restatement of this argument, relying on the canon of construction *expressio unius est exclusio alterius*, fails for the same reason.

how a party is joined.[6] Nor does it govern the "effects" of joinder. The limitations period is thus not governed by the "law of the court seized of the case."

UPS also relies on Article 48 – also contained within Chapter V – which states, "Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification." UPS contends that this language somehow prevents application of a limitations period where it would interfere with rights of contribution or indemnity. However, by its own terms, Article 48 does not apply to Article 35, which is not part of Chapter V.

UPS's reliance on the Guadalajara Convention is also misplaced. UPS argues that the Guadalajara Convention – whose language was incorporated in Chapter V of the Montreal Convention – did not contain any limitations period for actions between actual and contracting carriers. It argues that the drafters of the Montreal Convention, in incorporating the provisions of the Guadalajara Convention, intended to maintain a separate set of rules for third-party actions – rules that did not include a limitations period. But UPS is wrong on the facts. The Guadalajara Convention contains a clause

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[6] That the limitations period was not considered a matter of "procedure" by the drafters of the Montreal Convention is further supported by the use of that word in other articles. Article 33(4) states that, in actions under the Montreal Convention, "[q]uestions of procedure shall be governed by the law of the court seized of the case." Interpreting "procedure" to include any applicable limitations period would place Article 33 in conflict with Article 35.

incorporating the rules of the Warsaw Convention, including its limitations period provision. (See Decl. of Geoffrey W. Gill in Supp. of Third Party Pl.'s Opp'n to Third Party Def. Qantas Airways Limited's Mot. To Dismiss Ex. 4, art. II.) A substantially identical clause is now part of the Montreal Convention. Montreal Convention, art. 40.

UPS further argues that applying the two-year limitations period to contribution and indemnification actions leads to inequitable results where only one carrier is sued after or soon before the limitations period has expired. In such a case, the original defendant will lose its ability to seek indemnity or contribution. This may be true, but it was the intent of the drafters of the language now incorporated in Article 35 to promote uniformity over individual equity. The Montreal Convention is the successor to the Warsaw Convention, whose purpose was to promote uniformity in the field of international air transportation. Motorola, Inc., 42 F. Supp. 2d at 955. To promote this purpose, the drafters intended that there be no exceptions to the time limitation. See id. ("[T]he delegates to the Warsaw Convention expressly desired to remove those actions governed by the Convention from the uncertainty that would attach were they to be subjected to the various tolling provisions of the laws of the member states. . . . [T]he two-year time limitation specified in Article 29 was intended to be absolute - barring any action that was not commenced within the two-year period."); Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 143 (2d Cir. 1998) ("Almost every court that has reviewed the drafting minutes of the Convention, including the district court in this case, has rejected the contention

that Article 29 [now Article 35] incorporates the tolling provisions otherwise applicable in the forum.")

UPS's proposed rule would destroy uniformity and predictability in cases involving transport by a carrier other than the contracting carrier. Because the Montreal Convention allows a plaintiff to sue either the actual or contracting carrier (or both), the application of the Convention's time limitation would depend on the whim of the plaintiff. If named in the first instance, a carrier could assert the Convention's time limitation. But if joined as a third-party defendant, the carrier would be subject to the various statutes of limitations for contribution and indemnity actions in the forums where it might be sued. This outcome would be inconsistent with the Convention's overarching purpose of promoting uniformity and predictability.

UPS provides nothing to support its claim that the drafters of the Montreal Convention intended to abandon their interest in uniformity in order to alleviate any asserted inequity suffered by third-party plaintiffs under Article 35. The language of Article 45 does not suggest they intended such a result. The Court may not ignore the language of the Article 35 in order to protect UPS's asserted right to contribution or indemnity.

UPS's remaining contentions merit little discussion. UPS cannot rely on vague statements from the Convention's Preamble about its purpose to "modernize" liability rules and achieve an "equitable balance of interests" to contravene the clear and unambiguous limitations period contained in Article 35. And the Court cannot ignore the language of the

Convention in order to harmonize the limitations periods for claims arising from air transport and sea transport.

UPS's claims are subject to the two-year limitations period contained in Article 35. Because UPS did not file its Complaint until nearly a year after the limitations period expired, its claims are barred.

IV. CONCLUSION

For the foregoing reasons, Third-party Defendant Qantas's Motion To Dismiss is GRANTED with prejudice.

IT IS SO ORDERED.

Deputy Clerk AB for PP